16-626

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 105.

THOMAS RUSSELL, COLLECTOR OF CUSTOMS, PLAINTIFF IN ERROR,

vs.

ROBERT B. WILLIAMS, JR., H. D. HALL, AND L. C. KIMBALL, PARTNERS UNDER THE FIRM NAME OF WILLIAMS & HALL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 18, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 105.

THOMAS RUSSELL, COLLECTOR OF CUSTOMS, PLAINTIFF IN ERROR,

vs.

ROBERT B. WILLIAMS, JR., H. D. HALL, AND L. C. KIMBALL, PARTNERS UNDER THE FIRM NAME OF WILLIAMS & HALL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

INDEX.

	Original.	Print.
Writ of error	1	1
Return on writ of error	2	1
Declaration	3	2
Agreed facts	5	2
Copy of protest	8	3
Final judgment	9	3
Opinion of the court	11	4
Clerk's certificate	20	6
Citation	21	6

1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Robert B. Williams, jr., H. D. Hall, and L. C. Kimball, copartners, under the firm name of Williams & Hall, and having their usual place of business in Boston, in said district, plaintiffs, and Thomas Russell, collector of the customs for the revenue district of Boston and Charlestown, in said district, defendant, in a plea of the case a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October current, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this tenth day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—

NATHAN CLIFFORD,
Associate Justice U. S. Supreme Court.

2 Circuit court of the United States, district of Massachusetts, ss

And now here the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this ninth day of October, A. D. 1879.

[SEAL.] JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Monday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and seventy-seven.

Before the honorable George F. Shepley, circuit judge.

ROBERT B. WILLIAMS, JUNIOR, H. D. HALL, and L. S. Kimball, copartners under the firm name of Williams & Hall, and having their usual place of business in Boston, in the district of Massachusetts, plaintiffs,
v.
THOMAS RUSSELL, COLLECTOR OF CUSTOMS for the revenue district of Boston and Charlestown, defendants.

4 In a plea of the case, for that the said defendant, on the day of the purchase of this writ, being indebted to the plaintiffs in two thousand eighteen & $\frac{50}{100}$ dollars for money received by the defendant to the use of the plaintiffs, in consideration thereof promised to pay the same amount to the plaintiffs on demand; yet he has not paid the same.

And also for that on the day of the purchase of this writ the said defendant, being indebted to the plaintiffs in the sum of two thousand and eighteen & $\frac{50}{100}$ dollars, demanded, exacted, and received of the plaintiffs by the defendant, then and now collector of the customs for the revenue district of Boston and Charlestown, under color of a law of the United States for the collection of duties on imports (and by the plaintiffs paid under protest), and before that time had and received by the defendant to the use of the plaintiffs—in consideration thereof promised to pay the same when he should be thereto afterwards requested. Yet the said defendant has not paid the sum, or any part thereof,
5 though thereto often requested, to the damage of the said plaintiffs, as they say, the sum of four thousand dollars.

The writ in this cause is dated the twentieth day of May, A. D. 1871, and was entered at the October term of this court, A. D. 1871, when and where the parties appeared by their respective attorneys. This cause was thence continued from term to term to the October term, A. D. 1876, when, to wit, February 15, 1877, the following agreed statement of facts was filed, namely:

Agreed statement of facts.—Filed Feb. 15, 1877.

The plaintiffs, on the fourteenth day of February and on the third day of April, 1871, imported into the port of Boston from Liverpool 988 packages of tea, i. e., 315 packages by the steamship Calabria, Feb. 14th, and 673 packages by the steamship Siberia, April 3d, and entered the same in warehouse under bond. At various subsequent dates the plaintiff withdrew these teas for consumption. These *these* teas were produced in China. The defendant assessed and
6 plaintiffs paid to the defendant as collector of customs duties thereon at the rate of fifteen cents per pound and in addition a duty of ten per cent. ad valorem.

The defendant assessed and exacted the duty of fifteen cents per pound under the provisions of section 21 of the act of July 14th, 1870 (16 Stat., 262), which provides that after the thirty-first day of December, eighteen hundred and seventy, in lieu of the duties now imposed by law on the articles hereinafter enumerated or provided for imported from foreign countries, there shall be levied, collected, and paid the following duties and rates of duties, that is to say, on teas of all kinds,

15 cents per pound. The defendant assessed and exacted the additional duty of ten per cent. ad valorem under the provision of section 6 of the act of March 3d, 1865 (13 Statutes, 493), which provides that "there shall be hereafter collected and paid on all goods, wares, and merchandise of the growth or produce of countries [east] of the Cape of Good Hope (except raw cotton and raw silk as reeled from the cocoon, or not further advanced than tram, thrown, or organsine) when
7 imported from places west of the Cape of Good Hope, a duty of ten per cent. ad valorem in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production." Plaintiffs admitted that the duty of 15 cents per pound was legally imposed, but denied that their imports were subject to the ten per cent. additional duty, and paid the same under protest, a copy of one being hereto annexed, which may stand for both. Plaintiffs duly, and in conformity to law, appealed to the Secretary of the Treasury, who affirmed the action of the defendant, and the plaintiffs in due time brought this action for the recovery of the additional ten per cent. ad valorem so paid, amounting to $2,018.50 in gold. If the court shall be of opinion that fifteen cents per pound was the only duty legally chargeable upon these teas, then judgment shall be entered for the plaintiffs for 2,018.50 dollars in gold, with interests and costs. If, on the contrary, the court shall be of opinion that the teas were legally chargeable with the ten per cent. addi-
8 tional duty, the judgment shall be entered for the defendant, with costs.

CHAS. LEVI WOODBURY,
Att'y for Pl'ff.
GEORGE P. SANGER, *U. S. Att'y,*
Attorney for Defendant.

Copy of protest.

No. 530.] [Bond 1827.

Man. 203.] BOSTON, *February* 20, 1871.

Hon. THOS. RUSSELL, *Collector of Customs,*
Port of Boston and Charlestown:

DEAR SIR: We hereby protest against the liquidation of the duties as made by you, and against the payment of ten per cent. additional duty as assessed and exacted by you, on our invoice of tea imported by us from Liverpool per steamer Calabria, entered at this port February 14, 1871.

The ground of our protest is that the 21st section of the act of Congress passed July 14th, 1870, entitled "An act to reduce internal taxes and for other purposes," provides that "after the 31st day of December, 1870, in lieu of the duties" then imposed, the duty on teas of all
9 kinds shall be fifteen cents per pound; and by virtue of said act said tea so imported and entered by us was subject to a duty of fifteen cents per pound, no more; and said additional duty of ten per cent. ad valorem could not legally be imposed and exacted thereof.

We intend this protest to apply to all further similar exactions.

Very respectfully, yours,
(Signed) WILLIAMS AND HALL.

This cause was thereupon set down for hearing upon the agreed statement of facts aforesaid and fully heard by the court, the honorable

Daniel Clark, district judge of the United States for the district of New Hampshire, duly appointed to hold said circuit court by the honorable George F. Shepley, circuit judge, sitting. This cause was thence continued under advisement to this present term, and now, to wit, January 24, 1878, it is considered by the court, the honorable Daniel Clark sitting as aforesaid, that the said Robert B. Williams, jr., H. D. Hall, and L. C. Kimball, plaintiffs, recover of the said Thomas Russell, collector, defendant, the sum of two thousand and eighteen dollars and fifty cents ($2,018.50) in gold, and the further sum of eight hundred and nineteen dollars and thirteen cents ($819.13), interest thereon to this present date, together with their costs of suit, taxed at * * *.

A true record. Attest:

JOHN G. STETSON, *Clerk.*

The following is the opinion of the circuit court upon which the final decree was entered in said cause January 24, 1878:

Circuit court of the United States, district of Massachusetts. October term, A. D. 1877, to wit, Jan'y 24, 1878.

R. B. WILLIAMS ET AL.
v.
THOMAS RUSSELL.

Opinion of the court.

CLARK, J.

The plaintiffs imported two cargoes of tea from Liverpool to Boston; the first by the steamship Calabria, on the fourteenth of February, 1871, of 315 packages; the second by the steamship Siberia, on the third day of April, 1871, of 673 packages. These teas were warehoused and afterwards withdrawn by the plaintiffs for consumption. They were the growth and produce of China. The defendant assessed upon them, and the plaintiffs paid to the defendant, as collector of customs, a duty of fifteen cents per pound, and an additional duty of ten per cent. ad valorem. Against this last duty the plaintiffs protested, and appealed, in conformity with law, to the Secretary of the Treasury, whose decision was adverse to them. They thereupon brought this action in proper time to recover the sum so exacted of them, as they say, illegally, to wit, the ten per cent. ad valorem.

The question for the court is, was such a duty chargeable by law upon these importations? These teas were the growth and produce of China, a country "east" of the Cape of Good Hope, and they were imported from Liverpool, a place "west" of the cape. By the act of June 30th, 1864 (13th St. at Large, 202), there was imposed "on teas of all kinds twenty-five cents per pound." By the same act (sec. 18, p'g' 216, of the same vol. of the st's) it was provided that there shall be levied, collected, and paid on all goods, wares, and merchandise of the growth or produce of countries east of the Cape of Good Hope (except raw cotton) when imported from places west of the Cape of Good Hope, a duty of ten per centum ad valorem in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production. This is sometimes called the Cape of Good Hope clause.

By these two provisions of the act of 1864, tea being the growth and

produce of countries east of the Cape of Good Hope, when imported from the places west of the cape, was subject to a duty of twenty-five cents per pound, and an additional duty of ten per cent. ad valorem.

In 1865, by the act of March 3d (13th St. at Large, 493, sec. 6), Congress modified the act of 1864, but re-enacted the Cape of Good Hope clause, further excepting from its operation, beside raw cotton, raw silk as reeled from the cocoon or not further advanced than tram, thrown, or organzine, and thus stood the law as to duties upon
14 this article until 1870, when by the act of July 14th (16th Stat. at Large, 262) it was enacted; that after the thirty-first day of December, 1870, "in lieu of the duties now imposed by law" (that is, at the time of the passage of the act) "on the articles hereinafter enumerated, or provided for, imported from foreign countries, there shall be collected and paid the following duties and rates of duties, that is, to say, on teas of all kinds fifteen cents per pound."

The plaintiffs contend that this provision of the act of July 14th, 1870, was virtually a repeal of both the act of 1864, imposing a duty of twenty-five cents per pound on tea of all kinds, and also of the act of 1865, imposing a duty of ten per cent. ad valorem on articles the growth or product of countries east of the cape of Good Hope, when imported from places west of the cape, so far as it touched or operated upon importations of tea, and that the only duty that could be imposed on tea after the thirty-first day of December, 1870, was a duty of fifteen cents per pound.

15 . The defendant contends that the act of July 14th, 1870, did not operate to repeal the act of March, 1865, as to tea, but left tea subject to a duty of fifteen cents per pound and an ad valorem duty of ten per cent. when imported from places west of the Cape of Good Hope.

If we look to the language of the act of July 14th, 1870, there will be found in it no apparent ambiguity. It is clear and explicit. "In lieu of the duties heretofore imposed by law on the articles hereafter mentioned there shall be levied and collected, that is to say, on teas of all kinds fifteen cents per pound." The provision is broad enough to include in its scope teas wherever grown and from whatsoever place imported; whether Shanghai, Pekin, Liverpool, or the Sandwich Islands. The language is from "foreign countries," that is, all foreign countries, not those alone which are east of the Cape of Good Hope, but those west as well. It is as if Congress had said, all laws imposing duties on tea are repealed, such repeal to take effect on the 31st
16 day of December, 1870, and thereafter the duty on tea of every kind shall be fifteen cents per pound, imported from foreign countries.

Speaking of the expression "in lieu of the duties now imposed by law" the court, in Washington Mills v. Russell, 1 Holmes, 247, say, "It is an expression frequently used when the intention of Congress is to repeal duties previously in force, and these terms have come to be considered the peculiar apt words of revenue repeal." In the case of Gossler v. The Collector of Boston, before Judges Clifford and Lowell, cited in Washington Mills v. Russell, 1 Holmes, 247, the court say, "Terms more explicit and comprehensive could not be employed, and the provision neither contains any exception nor admits of any, without resort to positive legislation." Can it, then, be limited so as to repeal the tax of 25 cents per pound and not the tax of ten per cent. ad valorem? It is contended that for a long series of years, and by many enactments

similar to sec. 6 of the act of March 3d, 1865, Congress has pur-
17 sued the policy of encouraging by discriminating duties a direct trade in American vessels, and beyond the Cape of Good Hope. But no policy of the government can be admitted to control so plain and positive enactment as that in question. Hadden v. The Collector, 5 Wall., 107.

Again, it is objected that the ad valorem duty imposed by sec. 6 of the act of March 3d, 1865, is not a duty on tea; and so not within the letter and scope of the act of July 14th, 1870. But such an argument is destructive of itself, and must fail. It is felo de se. If that section does not impose a duty on tea, where does the defendant find any authority whatever to assess the duty in question in this case? This is a duty on tea, "Aut Cæsar aut nihil," that or nothing. It is quite true the section does not impose a duty on tea eo nomine; but it does impose a duty of ten per cent. ad valorem on goods, wares, and merchandise the growth or produce of countries east of the Cape of Good
18 Hope (excepting raw cotton or raw silks of certain kinds) when imported from places west of the cape, in addition to the duties imposed on any such article when *imposed on any such article when* imported directly from the place of their growth and production; and a duty on a class, if there be no exception, is a duty on all the articles within that class. Tea in this case is within the specific class, and not within the exception, and this duty falls, in this case, not on the class, but on this particular article of the class. There must be judgment for the plaintiffs for the amount agreed upon, in gold. Much strength is given to this conclusion by the consideration that by the act of 1872 (17 St. at Large, 232, sec. 3) the Cape of Good Hope clause was re-enacted, but it was provided that it should not take effect until on or after the first day of October then next, the act being passed in June. If in force, and not suspended or repealed by the act of 1870, as the defendant contends, why the provision in re-enacting it, that it should not go into operation until a future time? Very clearly Congress
19 in 1872 understood it not to be operative on certain articles until made operative by the act of that year.

20 UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the district of Massachusetts, within the first judicial circuit, certify that the foregoing is a true copy of the record of said circuit court in the cause of Robert B. Williams, jr., et al., plaintiffs, v. Thomas Russell, defendant, lately determined in said circuit court and of all proceedings therein, and of the opinion of the court.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court at Boston, in said district, this ninth day of October, A. D. 1879, and of the Independence of the United States the one hundred and fourth.

[SEAL.] JOHN G. STETSON, *Clerk.*

21 The United States of America to Robert B. Williams, jr., H. D. Hall, and L. C. Kimball, copartners under the firm name of Williams & Hall, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October current, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Massa-

chusetts, wherein Thomas Russell, collector, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this tenth day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

Due, sufficient, and legal service of this citation is hereby acknowledged.

CHAS. LEVI WOODBURY,
Att'y for Pl'ff.

(Indorsement on cover:) No. 105. Thomas Russell, collector of customs, plaintiff in error, vs. Robert B. Williams, jr., H. D. Hall, & L. C. Kimball, partners, under the firm name of Williams & Hall. Massachusetts C. C. U. S. Filed 18th October, 1879.

16-623

OFFICE SUPREME COURT U.S.
FILED
NOV 21 1882
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 105.

RUSSELL, Collector, &c.,

vs.

WILLIAMS, &c.

Brief for the United States.

S. F. PHILLIPS,
Solicitor General.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 105.

RUSSELL, COLLECTOR, &c., *vs.* WILLIAMS, &c.

BRIEF FOR THE UNITED STATES.

This was an action to recover from a collector of customs certain duties paid upon *tea*, the "growth of China," but imported from Liverpool in the early part of 1871. The importers had protested that the tea was liable to 15 cents per pound only, but the collector had exacted that duty with an addition of 10 per cent. ad valorem, upon the ground that the tea having been grown at a place *east* of the Cape of Good Hope, had been imported from a place *west* thereof.

The statute of 1865, Ch. 80, Sec. 6, which is relied upon in this connection by the collector, is given below, and also in an appendix to this brief, along with the series of statutes passed at various times upon the same subject.

The above contention was submitted in the court below upon an agreed statement of facts. (Folio 5.) The court gave judgment for the plaintiffs, and thereupon this writ of error was sued out.

For error is assigned, *the judgment given for the plaintiffs, instead of for the defendants.*

In the agreed statement it is said:

"The defendant assessed and exacted the duty of fifteen cents per pound under the provisions of section 21 of the act of July 14th, 1870, (16 Stat., 262,) which provides "that after the thirty first day of December, eighteen hundred and seventy, in lieu of the duties now imposed by law on the articles hereinafter enumerated or provided for imported from foreign countries, there shall be levied, collected, and paid the following duties and rates of duties, that is to say, on teas of all kinds, fifteen cents per pound." The defendant assessed and exacted the additional duty of ten per cent. ad valorem under the provision of section 6 of the act of March 3, 1865, (13 Statutes, 493.) which provides that "there shall be hereafter collected and paid on all goods, wares, and merchandise of the growth or produce of countries (east) of the Cape of Good Hope, (except raw cotton and raw silk as reeled from the cocoon, or not further advanced than tram, thrown, or organzine,) when imported from places west of the Cape of Good Hope, a duty of ten per cent. ad valorem in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production."

The grounds upon which the exaction in question is defended, are that the duty levied by the above provision in the act of 1865, which for convenience may be called *the Cape clause*, is one which in principle is imposed upon the special *commerce* by which the article is imported, and not upon the article, excepting so far as it may be involved in such commerce, and then only as a practical means of reaching the latter.

In other words the particular *commerce* in question has for several years been itself *a substantive object of duty*, just

as *tea*, *coffee*, *spirits*, &c., have been; so that regulations of the duty upon *tea*, &c., enacted subsequently to any statute regulating the duty upon the *commerce*, do not affect such latter duty; even if in some case in order to realize it it should be necessary to exact an additional rate upon such tea as may be *involved* therein. In case of such *involvement*, the policy as to the *tea* would give way to that as to the *commerce*, for of the two substantive objects of duty *when* so *involved*, the *tea* would be an *incident*, and the *commerce* the *principal*.

That in point of reason it is the *commerce*, and not the articles thereby imported, that is intended to be burdened by the act of 1865, is evident by, amongst others, the circumstance that the duty thereby imposed is *the same*, viz., 10 per cent., for all articles, no matter what may be the comparative rates amongst these by other provisions of the tariff then in force: For example, *teas*, (by other provisions,) 25 cents per pound, plus *commerce*, 10 per cent.; *diamonds*, 10 per cent., plus *commerce*, 10 per cent.; *jute yarns*, 25 per cent., plus *commerce*, 10 per cent.; *other manufactures of jute*, 25 per cent., plus *commerce*, 10 per cent. (13 Stat., pp. 202, 206, 210, &c.) Other illustrations would be superfluous.

The supposed contradiction upon the present topic betwixt the act of 1870 and that of 1865 is explained by saying that the ~~latter~~ former deals with teas *simpliciter*, and not *in special relations*—with teas only *qua* teas, and *not so far as they are only a means of enforcing some other distinct commercial policy*. So the additional words therein do *not* (as suggested in the opinion of the learned court below, folio 15) extend the field of its operation. For instance, the expressions "from

foreign countries," and "of all kinds." It might well be suggested that both of these expressions are superfluous. "Teas" are "teas *of all kinds;*" and things "imported" are necessarily "imported *from foreign countries.*" But allowing them weight—the *subject-matter* to which they are to be *restrained* is "teas" taken *per se*, or in phrase influenced by the point of view of the draughtsman of *the Cape clause*—*teas* "when imported directly," &c. They provide that teas of all kinds *may be* imported under a 15-cents-per-pound duty, but they do not at all forbid that, by *going out of his way*, as it were, the importer may collide with some other commercial tax, any more than they forbid that he may actually import them in such a way as to *forfeit* them entirely.

Upon the other hand, as we have seen, the act of 1865 does not deal with *teas* as such. Under that act it would make no difference to the United States whether a particular package worth $10,000, imported from Canton *via* Liverpool, were *teas*, or *diamonds*, or *women's woollen dress goods*, or *jute*, the duty in any case would be $1,000. So that it seems evident that the object of the act of 1865 was not *teas*, but something else which the law proposed to reach irrespective of the particular means by which it was to be reached, and therefore irrespective of the rates of duty upon *teas*, (when *they* became such *means*,) or indeed of their liability to duty at all.

In the earliest statute in which this *Cape clause* is found, (that of 1861, ch. 45,) another section imposed upon teas a duty of 15 cents per pound. It will be admitted that there would be nothing contradictory in such provisions when found in *the same* statute. Inasmuch as all statutes, in re-

gard to *revenue* duties, are in *pari materia*, and therefore to be construed together, it seems that the same provisions found in *successive* statutes of that sort, are as little contradictory, and therefore as little indicative of an intention to annul the earlier of the two, as when found together. Wood's case, 16 Pet., p. 362; Shaw's case, 28 Iowa, p. 77.

Again, it is submitted that there is nothing connected with the *re-enactment*, from time to time, of the *Cape clause* to indicate that Congress intended that, but for such re-enactment it should have been annulled by any general revenue law passed subsequently thereto, and imposing new rates of duty upon articles which, under some circumstances, came within its operation. Granting, for the argument's sake, that in some cases such intent might be made out otherwise than by contradictoriness in the very provisions of the enactment; for instance, by *a certain course of statutory dealing* with special objects of legislation, it seems that such an argument is a *refined* one, and requires clear premises to sustain it. Here, however, each re-enactment is accompanied by a substantial *change* in the provisions of the Cape clause. (See Appendix.)

Its *first* enactment (1861) imposed the duty upon all articles imported from beyond the Cape of Good Hope in foreign vessels, except where otherwise provided by treaty.

Its *second* enactment (1862) provided a duty upon goods, &c., the growth of countries *beyond* the Cape of Good Hope, when imported from places *this side* of such Cape.

Its *third* (1863) was an amendment, (not re-enactment,) excepting *cotton* and *raw silk* from this duty.

Its *fourth* (1864) for the first time speaks of goods the

growth or *produce* of countries *east* of the Cape of Good Hope, imported from places west of such Cape, and excepts *raw cotton* alone, adding certain *provisions*.

The *fifth* (1865) adds to the exception *raw silk*.

The *sixth* (1872) adds *wool*.

These important changes sufficiently explain the repetition; its *form*, (i. e., *re-enactment* instead of mere *amendment*,) being sufficiently accounted for by the circumstance that it makes part of a statute which is a *manual* for collectors, and is therefore more *convenient* when the whole of the provision is contained in one passage than when it must be looked for, (as might have been in the case here,) in four or more distinct volumes; the comparative bulk of the respective forms, (*re-enactment* and *amendment*,) being in the meantime, in this case, of no consequence in determining the choice.

There is, therefore, as is submitted, no ground for arguing that Congress has acted in this matter upon an assumption that *general* provisions for duties upon *teas*, &c., repeal not only previous *like provisions*, but also previous distinct provisions as to certain obnoxious *commerce*.

S. F. PHILLIPS,
Solicitor General.

See cases of Gautier (104 U. S. 345), Sturgis (12 Wall. 19), and Madden (5 Wall. 107).

APPENDIX.

Stat. 1861, Ch. 45, Sec. 3:

That all articles, goods, wares, and merchandise, imported from beyond the Cape of Good Hope in foreign vessels, not entitled by reciprocal treaties to be exempt from discriminating duties, tonnage, and other charges, and all other articles, goods, wares, and merchandise not imported direct from the place of their growth or production, or in foreign vessels, entitled by reciprocal treaties to be exempt from discriminating duties, tonnage, and other charges, shall be subject to pay, in addition to the duties imposed by this act, ten per centum ad valorem: *Provided*, That this rule shall not apply to goods, wares, and merchandise imported from beyond the Cape of Good Hope in American vessels. (12 Stat., 293.)

Stat. 1862, Ch. 163, Sec. 14:

That, from and after the day and year aforesaid, there shall be levied, collected, and paid on all goods, wares, and merchandise of the growth or produce of countries beyond the Cape of Good Hope, when imported from places this side of the Cape of Good Hope, a duty of ten per cent. ad valorem, and in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production. (12 Stat., 557.)

Stat. 1863, Ch. 77, Sec. 2:

That section fourteen of an act entitled, "An act increasing temporarily the duties on imports, and for other purposes," approved July fourteenth, eighteen hundred and sixty-two, be, and the same hereby is, modified so as to allow cotton and raw silk as reeled from the cocoon, of the growth or produce of countries beyond the Cape of Good Hope, to be exempt from any additional duty when imported from places this side of the Cape of Good Hope, for two years from and after the passage of this act. (12 Stat., 742.)

Stat. 1864, Ch. 171, Sec. 18:

That on and after the day and year this act shall take effect there shall be levied, collected, and paid on all goods, wares, and merchandise of the growth or produce of countries east of the Cape of Good Hope, (except raw cotton,) when imported from places west of the Cape of Good Hope, a duty of ten per centum ad valorem, in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production: *Provided*, That section three of the act approved August five, eighteen hundred and sixty-one, entitled "An act to provide increased revenue from imports, to pay interest on the public debt, and for other purposes." and section fourteen of the act approved July fourteen, eighteen hundred and sixty-two, entitled "An act increasing temporarily the rates of duties on imports, and for other purposes," be, and the same are hereby, repealed. (13 Stats., Sec. 216.)

Stat. 1865, Ch. 80, Sec. 6:

That there shall be hereafter collected and paid on all goods, wares, and merchandise of the growth or produce (east) of the Cape of Good Hope, (except raw cotton and raw silk, as reeled from the cocoon, or not further advanced than tram, thrown, or organzine,) when imported from places west of the Cape of Good Hope, a duty of ten per centum ad valorem, in addition to the duties imposed on any such article when imported directly from the place or places of their growth or production. (13 Stat., 493.)

Stat. 1872, Ch. 315, Sec. 3: R. S. Sec. 2501.

That on and after the first day of October next there shall be collected and paid on all goods, wares, and merchandise of the growth or produce of countries east of the Cape of Good Hope, (except wool, raw cotton, and raw silk as reeled from the cocoon, or not further advanced than tram, thrown, or organzine,) when imported from places west of the Cape of Good Hope, a duty of ten per centum ad valorem, in addition to the duties imposed on any such article when imported directly from the place or places of their growth or production. (17 Stat., 232.)

OFFICE SUPREME COURT U. S.
FILED
OCT 27 1882
JAMES H. McKENNEY, Clerk.

16-623

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 105. October Term, 1882.

THOMAS RUSSELL,

COLLECTOR OF CUSTOMS,

v.

ROBERT B. WILLIAMS, JR., ET ALS.

ERROR TO UNITED STATES CIRCUIT COURT, DISTRICT OF MASSACHUSETTS.

DEFENDANTS' BRIEF.

May it please the Court:

The defendants imported certain tea of China growth from Liverpool, and entered the same in 1871 at the custom house in Boston, claiming that under existing laws it was liable only to a duty of fifteen cents a pound.

16 Stat., p. 262, Act of 1870, Sect. 21: "And be it further enacted that after the thirty-first day of December, 1870, in lieu of the duties now imposed by law on the articles hereinafter enumerated and provided for, imported from foreign countries, there shall be levied, collected and paid the following duties, and rates of duties, that is to say, 'On teas of all kinds, fifteen cents per pound,'" etc.

The collector, admitting this, claimed a further duty of ten per cent, under and by force of the act of March, 1865, Sect. 6. The defendant protested, appealed, paid, and brought suit in due form of law to recover back the illegal assessment.

The cause was argued in the Circuit Court for the District of Massachusetts, on an agreed statement of facts, and the Court delivered an opinion that the additional ten per cent was illegally assessed, and rendered judgment for the plaintiff. The defendants brought a writ of error, and seek here to reverse the judgment.

BRIEF.

Shall the judgment stand?

Defendants in error cite the able opinion of Judge Clark, who rendered the decision, in the Circuit Court, and which is found at page 4 of the printed record as sustaining the correctness of the judgment.

The words "in *lieu of the duties* now imposed by law on articles hereinafter *enumerated and provided for*, imported from *foreign countries*," constitute an absolute repeal of all prior duties on such articles.

The clause refers to all foreign countries, and embraces countries, places, colonies or empires on either side of the Cape of Good Hope, or even that cape itself, or countries north or south of it.

All foreign countries are within its scope, and the record shows this import was from a foreign country.

"Enumerated and provided for," the text shows "teas of all kinds" are provided for and enumerated at fifteen cents a pound *irrespective of their value per pound.*

The words "in lieu of" are direct and absolute words of repeal commonly used by Congress and often judicially interpreted.

Gossler *v.* Collector, 3 Clifford, 71.

The Court say these words are the most explicit and comprehensive that can be employed, and admit of no exception; and the judgment in the case depends on their effect to repeal all prior rates of duties on the article (sugar) there in question.

In Echevearie *v.* Barney, 5 ~~Blatchf~~ Blatchf, 194.

Judge Nelson gives similar effect to the words "in lieu of."

The case also desides some other points.

The effect of these words in a subsequent statute to prevent he rate of duty of a prior "Cape" clause from being levied on wool was the issue in

Washington Mills *v.* Collector, 1 Holmes, 245.

And Judge Shepley decided the rate named in the Act of 1867, Wool Act, "in lieu of the duties now imposed by law on the articles hereinafter mentioned and embraced in this section," superseded and repealed the Cape duties, Act 1865, so far as the said articles were involved.

In the case at bar the language of the Act of 1870 is more particularly and descriptively general, omnitarious, and particular even than the wool case, because in using the words "imported from foreign countries," it negatives any and all ideas of discriminating between one foreign place and another foreign place; being thereafter applied to teas of all kinds. They are fully committed to fifteen cents per pound duty in all, and released from all *ad valorem* taxation. It is also to be noted that Congress did not re-enact, in this Act of 1870, any Cape clause at all; and it was only after a long hiatus, during which indirect trade had no duty imposed on it, and the Cape clause was not an existing but only a prospective law, that in October, 1872, teas were legislated into a statute containing a Cape clause. This will be discussed further on in this brief when replying to the plaintiff's position.

Defendants contend that these judicial expositions of the effect of the language of Sect. 21, 1870, are conclusive, that only the duty named in that section, fifteen cents per pound, could be legally levied on this import.

The first main proposition, whether the words "in lieu of the duties now imposed by law," etc., on teas "imported from foreign countries," convey in themselves, when taken alone, the intention to make the new "duty" the only one which can be lawfully levied on the import. Of this there cannot remain a doubt.

The next proposition is, whether in the Act of 1870 any exception, saving clause or reservation in favor of any duty levied by a prior act can be found? And the answer is, there are none.

The only refuge left for the plaintiff in error is to claim that the

Court shall import into the enacting clause of Sect. 21, 1870, a saving exception, that Sect. 6, 1865, shall also apply to tea after the passage of the Act of 1870. It is not a new idea; but this Court has always denounced its legality, whether applied to relieve treaties or statutes from repeal, save by subsequent legislation.

In the Cherokee Tobacco, 11 Wall. 620, in Taylor *v.* Morton, 2 Curtis, 454, and in the cases in those opinions cited, the doctrine is laid down vigorously.

"The section must be held to mean what the language imports. When a statute is clear and imperative, reasoning *ab inconvenienti* is of no avail. It is the duty of courts to execute it," says Justice Swayne, speaking for the court.

Says Mr. Justice Curtis, in Circuit, — in a hemp case, — p. 462, "It would do violence to the language of the act to force into it an exception which it did not contain."

In Gautier *v.* Arthur, 14 Otto, 345, which was an effort to import the prior "foreign bottom reciprocity discriminating duty" into the Act of 1872, Sect. 25, which said that "plumbago shall be exempt from duty," the Court refused to do violence to the statute, and held the import was "exempt from duty."

The statute levying an additional duty on goods in vessels of nations not in reciprocity with the United States substantially began in 1817, and is entirely distinct from the subject in issue here.

The history of that subject can be found in Oldfield *v.* Marriott, 10 Howard, 146; and in Arthur *v.* Gautier, 14 Otto, the words "exempt from duty" withdrew an article from its scope.

The Cape clause as to an indirect trade, which the plaintiff in error asserts, first appears in the Act of August, 1861, Sect. 3. In 1862, Sect. 14, with some variations it was re-enacted. In 1863, Sect. 2 (12 Stat. at L. p. 742), it was modified to except raw silk and cotton for two years. In 1864, June 30, Sect. 18 (13 Stat. p. 216), the Sect. 14, 1862, and the Sect. 3, 1861, were repealed by express words. A new clause was enacted, excepting raw cotton, which was approved June 30, 1864.

In 1865, Act of March 5, Sect. 9, provided it should take effect on the first day of April.

Sect. 6 enacted the Cape clause here in question, with new exceptions in the articles excluded.

These numerous re-enactments must be considered with the context of the statutes, and each statute shows sections which began "in lieu of the duties heretofore imposed by law," Congress thus repealing *all prior duties*, was compelled to re-enact a direct trade Cape clause if they desired to impose such a clause on commerce in the future as an addition. In 1861, there were four sections; in 1864, eight sections; and in 1865, one section imposing duties which began with these positive words, "In lieu of the duties heretofore imposed by law."

The deduction from this is, that although Congress has made the Cape clause rule articles taxed in prior statutes, and be an addition thereto, and the Court has so construed, yet whenever in these statutes Congress has imposed a new duty in lieu of the duties heretofore imposed by law, it has considered these words equally repugnant to the Cape clause and all other prior levies; and it has in the act wherever it willed such clause should apply in the future made a distinct re-enactment thereof in the same section, and all the courts of the United States which have passed on the question have agreed this is the true effect of the words.

But the further history of this clause shows this congressional intent still more strikingly.

The Act of 1870, July 14, repeals all existing duties, additional or otherwise, on the articles named therein, and enacts new duties thereon, to take effect after Dec. 31, 1870. Among these are teas, coffee, sugar, mace, cloves, etc.

The resolution, May 1, 1872, refunding duties paid, and placing tea and coffee in bond or on shipboard, July 1, on the free list, is irrelevant, except that it shows a persistent attempt to reduce duties on teas.

There were many articles that were dutiable under the Act of 1865 which were not included in the repealing schedules of the Act of 1870, and which remained subject to a Cape duty until the Act of June 6, 1872.

In this act there are three sections which begin "in lieu of," etc.

Sect. 3 enacts that merchandise,—the growth and produce of countries east, etc., (except wool, cotton, raw silk, organzine, etc.), — when imported from places west of the Cape, shall, on and after Oct. 1, pay an additional duty of ten per cent.

~~Sect. 4 of~~ The act went into effect Aug. 1, 1872.

Sect. 46 repeals all acts inconsistent, etc.

Here, then, from August to October, no additional duty was permitted to be in force upon the articles which until 1872 had remained unchanged from the time — 1865 — when they became subject to a Cape additional duty.

Out of such changing provisions no idea of an overriding and unvarying policy can be evoked. Eminently in this contest, "It is a ground much too unstable upon which to rest the judgment of the Court in the interpretation of statutes."

Haddon *v.* The Collector, 5 Wallace, 111.

The *construction of the clauses* as to this indirect trade has twice been before the Supreme Court.

In Haddon *v.* Collector, 5 Wallace, that court said that the clause affected merchandise which otherwise was free from duty

under *prior* laws, and imposed ten per cent when within its descriptive words.

In Sturges *v.* The Collector, 12 Wallace, 25, which was on the 1865, Sect 6, the Court defined the latter clause of the section, "to close the door against any suggestion that the new provision repealed or modified the *prior* law, it was provided that the new duty was in addition to the duties PREVIOUSLY imposed on any such article when imported directly from the place or places of their growth or production."

The Court confirms the fifth Wallace opinion to this second point, that the first part of the clause is a pure and simple levy of duty of ten per cent on a class of merchandise.

Power *v.* Comly, 11 Otto, 790, is to another point.

The question now brought before the court regards its effect in *subsequent* statutes. Can Congress, by positive words, in a subsequent act, withdraw a particular merchandise from the operation of a prior act?

The opinion of Congress, as shown in their acts, has been that it can do this.

Congress has treated the Cape clause as a mere impost on merchandise, and whenever they have repealed former tariffs and imposed new ones in place of them, they have re-enacted the Cape clause if they wanted it to apply as an addition to the new imposition of duty on merchandise. This the numerous re-enactments in their new tariffs sufficiently show.

It will not be claimed that a revenue policy against reducing duties is to be assumed by this court as existing when one third of the imports are now free goods.

A Congressional policy not to levy additional duties on the indirect Cape trade existed in 1872, as statutes show, so it also was prior to 1861; there is no logical right to assume a settled policy between these dates, amid so many repeals or enactments and changes *as took place in* that interim. The language of the statutes must control.

In 1867, Congress passed a new wool tariff, and enacted, "in lieu of the duties heretofore imposed, there shall be levied and paid" on wool, etc., imported from foreign countries, etc.

In the case of Washington Mills *v.* Collector, 1 Holmes, 245, it was proposed by the plaintiff that this language repealed the Act of 1865-6, so far as wool was concerned. The late able and distinguished Judge Shepley decided that the word of repeal "in lieu of the duties now imposed by law imported from foreign countries," expressly repealed all the duties previously imposed, the additional Cape duty as well as the others.

This case did not go to the Supreme Court, because the treasury accepted the decision of the Court as conclusive of the law as it stood prior to the Act of 1872.

The Act of Congress, 1872, June 6, confirmed the correctness of

this decision. I say so, because it made a new tariff, re-enacted the Cape clause, and named "wool" in the body of that clause among the articles excepted from its influence.

Wool remained in 1872 under the original Act of 1867, and in enacting the Cape clause of 1872 as additional to the *prior and existing* laws, unless Congress had excepted wool, it would fall under the Cape clause in 1872, but to this day it is not subject to a Cape clause.

Can further proof be required to show that Congress considered the words "in lieu of" as a repeal of all existing duties on the article?

In a question of duties on sugar, Gossler *v.* The Collector, May term, 1867, Judges Clifford and Lowell, cited by Judge Shepley in the Washington Mills case, from MS., since reported, 3 Clifford, 71.

The effect of the words of the Act of 1861, Dec. 24, "in lieu of the duties heretofore imposed by law," was the question.

The Court said, "Terms more explicit and comprehensive could not be employed, and the provision neither contains any exception, nor admits of any, without the necessity of resorting to positive legislation"; and the Court held it repealed special provisions of former statutes. ~~This clause is respectfully submitted.~~

For these and other grounds which will be apparent to this honorable Court in perusing the record, the defendants submit that the judgment of the Circuit Court ought to stand affirmed.

All of which is respectfully submitted.

CHAS. LEVI WOODBURY,

Counsel for the Defendants in Error.

OFFICE SUPREME COURT U. S.
FILED
NOV 27 1882
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

No. 105. OCTOBER TERM, 1882.

THOMAS RUSSELL *v.* ROBERT B. WILLIAMS ET ALS.

ADDENDA TO DEFENDANTS' BRIEF.

The proposition of the plaintiff that the clause is one where the commerce is taxed is not admitted to be correct. It is a duty clause levied on the articles imported.

Plaintiff does not claim it is like the foreign bottom reciprocity clause, nor do we.

Plaintiff considers it a tax on commerce so peculiar and permanent that a subsequent repeal of the duties on articles of the description embraced in it will not repeal the duty levied by this clause. Defendants have argued that Congress never regarded it as a permanent and fixed policy, but have not only repealed, altered, re-enacted it, but that since its primal appearance in 1862 there have been times when no duty of this kind was in force.

Since defendants presented their brief the statutes of 1882 have been published and the act of May 4, 1882, has repealed § 2,501 of the Revised Statutes (this clause), to take effect from and after Jan. 1, 1883. See Chap. 120, p. 58.

The statutes show that since 1863 this clause has never been a general rule within its descriptive words, but that more or less articles have been excepted in the enactment. One reason for this evidently is because this Court, in 1866, in Haddon's case, decided the *re-enactment* would reach *prior* free goods. Congress, therefore, had to consider in every new tariff the articles the levy should apply to in future, such as they did on wool, and also on cotton, silk, etc. Congress undoubtedly considered they could repeal any

duty clause effectively by any language that conveyed their thought to the judiciary. Either words of direct repeal, repugnant or inconsistent enactments accomplish the purpose. The argument of plaintiff substantially is that nothing but direct repeal *eo nomine* of that clause can destroy its force on everything not embraced in the exceptions to its enacting clause.

In Gautier's case, 14 Otto, on foreign tonnage clause, the Court say that the words of § 5, 1872, "The following articles shall be exempt from duty: Plumbago," repeals the tonnage duty *quoad* plumbago, *because* they also find in § 46 that inconsistent acts are repealed *without* saving this.

The Court clearly held that the enacting words of § 5 were inconsistent with the foreign tonnage not entitled to reciprocity clause.

In the Haddon and the Sturges cases they held that the indirect trade clause re-enacted was inconsistent with the prior tariff free lists on a particular article.

In the cases cited in defendants brief, decided by Judges Clark, Shepley, Clifford, Lowell, in substance, these distinguished jurists have said that the words "in lieu of" in a new statute are inconsistent with all prior statutes levying duties on the same article, and therefore *pro tanto* repeal them. The Treasury Department, with its law officers, acquiesced in this view years ago in the wool case.

From the first change in a United States revenue tariff to the beginning of this cause, not an instance can be found where the judicial, the executive or the congressional departments of government ever imputed less force to the words "in lieu of" in a duty act than an unqualified repeal of former rates and the substitution of the new, all of which is respectfully submitted.

CHARLES LEVI WOODBURY,

Plaintiff's Attorney.